

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Mark S. Kern,

Debtor.

Kevin Campbell, Trustee

Plaintiff,

v.

Mark S. Kern,

Defendant.

C/A No. 98-00420-W

Adv. Pro. No. 98-80092-W

JUDGMENT

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Notice of Settlement filed by Debtor on August 13, 1999 is denied.

Columbia, South Carolina,
October 20, 1999.


UNITED STATES BANKRUPTCY JUDGE

ENTERED

OCT 25 1999

J.G.S.

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ORDER

Chapter 7

THIS MATTER comes before the Court upon the Notice of Settlement and Compromise (hereinafter "Notice of Settlement") filed by Debtor on August 9, 1999. The Notice of Settlement seeks to set aside the Court's July 28, 1998 Order denying Debtor's discharge and requiring Debtor to turnover \$14,256.00 to the Trustee and to purge the Court's October 13, 1998 Order finding Debtor in civil contempt and awarding sanctions of \$540.00 for his repeated failure to attend Rule 2004 examinations as ordered by this Court. After receiving the testimony and carefully considering all the evidence, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable by Rule 7052 of the Federal Rules of Bankruptcy Procedure.

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FINDINGS OF FACT

1. Debtor filed for relief under Chapter 7 of the Bankruptcy Code on January 20, 1998. He was represented in his bankruptcy case by Philip L. Fairbanks, Esquire.

2. On May 19, 1998, the Trustee filed a Complaint requesting the denial of Debtor's discharge pursuant to 11 U.S.C. §727(a)(2), (3), (4), and (5).¹ The Complaint also requested that the Court require Debtor to account for and turnover certain accounts receivable attributable to the sale of a stock interest, alleged to be property of the bankruptcy estate.

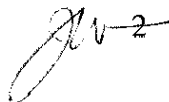
3. Even though he was being represented by counsel,² Debtor failed to respond to the Trustee's Summons and Complaint and default judgment was entered on July 28, 1998, denying Debtor's discharge and ordering Debtor to turnover the sum of \$14,256 to the Trustee. No appeal of that Order or motion to reconsider was filed by Debtor.

4. By four separate orders, two of which were consent orders entered into between counsel for the Trustee and counsel for Debtor, the Court ordered Debtor to appear and be examined by the Trustee pursuant to Bankruptcy Rule 2004. Debtor failed on each occasion to appear at the examination.

5. As a result of a Motion by the Trustee and Rule to Show Cause, Debtor was ordered to appear and show cause why he should not be held in civil contempt for his failure to comply with the aforesaid Court orders. Despite notice, Debtor failed to appear at the hearing on the Rule to Show Cause held on September 10, 1998.

¹ Further references to the Bankruptcy Code shall be by section number only.

² Mr. Fairbanks was relieved as Debtor's counsel on September 18, 1998, due to Debtor's failure to attend rescheduled § 2004 examinations, to provide the Trustee with information, and to follow instructions or pay legal bills.



6. By Order entered October 13, 1998, Debtor was found to be in civil contempt of the Court's orders and was ordered to pay to the Trustee, within 15 days, attorney fees and costs in the amount of \$540.00. Debtor failed to pay such amount as ordered.

7. Debtor, through new counsel Barry W. Bellino, Esquire, filed a Notice of Settlement on August 9, 1999, seeking to set aside the Order entered on July 28, 1998, denying discharge and ordering turnover and to purge the Court's Order of October 9, 1998, finding Debtor in civil contempt and awarding attorneys fees of \$540.00 to the Trustee. Pursuant to the Notice of Settlement, Debtor offered to pay \$4,000 to the Trustee and receive in return a reinstatement of the discharge and reversal of the aforesaid orders. The \$4,000 payment is apparently being provided by Debtor's father. No objection to the settlement was filed by any party, including the United States Trustee (hereinafter "UST"), on or before the deadline for objections.

8. By Order of September 10, 1999, the Court requested that the UST file a statement regarding the proposed settlement. On September 27, 1999, the UST submitted a statement expressing a decision not to object to the Notice of Settlement despite a finding that the objection to discharge was meritorious and properly entered.

9. At the hearing on the Notice of Settlement, the Trustee characterized the Notice of Settlement as a Rule 60(b) request and stated that he was now satisfied that the accounts receivable at issue may have been in the nature of a monthly gift made to Debtor by his father, and therefore not recoverable by the estate. The Trustee further recommended the settlement and stated that if the court approved it, he would cap his claim for fees and expenses in the case to the amount of \$2,400 in order to leave \$1,600 for the payment of creditors' claims, a dividend which he estimated to be 10 percent of remaining allowed claims.

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10. The total allowed and unobjected to claims in this case is \$19,966.57. A distribution of \$1,600 to those claimants would provide a dividend of approximately 8 percent.

CONCLUSIONS OF LAW

Rule 60(b) of the Federal Rules of Civil Procedure provides that a court may relieve a party from a final judgment for various reasons, among which are the following: “(5) . . . a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.” Fed. R. Civ. P. 60(b). After considering the evidence before it, this Court finds that the Notice of Settlement cannot be approved; therefore, the Court denies the parties’ request to reinstate the discharge in this case and purge the Order of Civil Contempt.

It is the general rule that a proposed compromise can only be approved by a court if it is “fair and equitable.” Jacobson v. Speece Properties, Inc. (In re Speece), 159 B.R. 314, 317 (Bankr. E.D. Cal. 1993). When applying the “fair and equitable” standard in considering a settlement, courts take into consideration the merit behind the denial of the debtor’s discharge as well as the interest of the creditors. See id.

The first issue before this Court is the merit of the denial of discharge order pursuant to §727. The Notice of Settlement seeks relief from judgments entered by the Court and the reinstatement of Debtor’s discharge. In his sworn schedules filed with the assistance of bankruptcy counsel, Debtor had indicated that he was receiving approximately \$1,188.00 per month in accounts receivable associated with his sale of a stock interest. He did not indicate receipt of such amounts as a gift. Despite the Trustee’s repeated requests over a period of several

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months, Debtor refused to provide information concerning this receivable and failed to provide the Trustee with other specific financial information. As a result of these failures, the Trustee properly objected to Debtor's discharge. Although represented by counsel, Debtor failed to respond to the Trustee's complaint, as a result, Debtor's discharge was denied by Order of this Court entered on July 28, 1998. Debtor did not appeal the Order, nor did he file a motion to reconsider. In September of 1998, Debtor's counsel requested and was allowed to withdraw from representation because Debtor would not respond to him or cooperate with the Trustee. More than a year has passed since the entry of the judgment. Debtor now proposes a settlement for the Court's approval; seeking the reinstatement of the discharge in exchange for Debtor's payment to the Trustee in the amount of \$4,000, the setting aside of the turnover Order, and the purging of the Civil Contempt Order and award of attorneys fees. Upon the Court's request, the UST investigated the matter and concluded that the Trustee's objection to discharge pursuant to §727(a)(2), (3), (4), and (5) was justified. Assessing the merit of the denial of Debtor's discharge pursuant to §727, this Court concludes that the parties have failed to offer any evidence to meet the requirements of Rule 60 in order to justify relief from the prior orders and judgments. In fact, at the hearing on the Notice of Settlement, no evidence was offered by either party which would prove that Debtor did not violate §727, and Debtor even failed to appear at the hearing to offer any proof.

"[A] discharge in bankruptcy should be granted only to those who are entitled to it." In re Speece, 159 B.R. at 322. In this case, Debtor knowingly and wilfully failed to comply with the Trustee's requests to provide information, thus hindering and interfering in the administration of the bankruptcy estate. Furthermore, Debtor failed to keep or preserve any information regarding

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his financial condition or business transactions and withheld such information from the Trustee. Such actions warrant the denial of discharge. §727(a)(2), (3), (4), and (5); see also Russo v. Nicolosi (In re Nicolosi), 86 B.R. 882, 885 (Bankr. W.D. La. 1988) (denying a proposed compromise, *after the court's denial of debtor's discharge*, whereby the creditor agreed to debtor's general discharge in exchange for the nondischargeability of the creditor's individual claims). There is no question that Debtor's failures caused significant expense and delay to the Trustee, the estate, and the Court. There is no suitable substantive basis to set aside this Court's final order denying the discharge.

Furthermore, "[w]aiting until after the discharge is denied is waiting too long. Once a judgment is entered denying discharge, vacatur of judgment on account of subsequent settlement . . . is not appropriate." In re Speece, 159 B.R. at 323. As recently stressed to this Court in other cases by the UST, the public policy behind this is evident. Permitting the reversal of a judgment denying discharge may give debtors the incentive to hide property or withhold information at the time the petition is filed. Only if the debtor loses his discharge, would he then attempt to settle matters by handing over the hidden property or releasing the records sought by the opposing party. See id; see also Clark v. Hiller (In re Hiller), 179 B.R. 253, 261 (Bankr. D. Colo. 1994). In this case, Debtor defaulted and an order denying discharge was properly entered; it was not until over a year after the entry of the judgment that Debtor attempted to settle with the Trustee by offering a portion of the amounts he owed to reinstate the discharge. The Court finds no error occurred or cause now exists which would require a reversal of the previous orders; thus, approving the settlement would be inappropriate in this case.

The second issue of concern to the Court is the interest of the creditors. The Trustee

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estimated that the proposed settlement would allow a 10% distribution to unsecured creditors,³ and that such an amount appears to be more than creditors would receive if the settlement were not approved. Surprisingly, the UST seems to accept this analysis.⁴ However, the Court finds that the belief that creditors may receive more in a \$1,600 settlement than they would receive if their debts were not discharged is based on mere speculation. First, the Court notes that the remaining creditors appear to be national credit organizations which are experienced in collecting their debts. Second, from the figures provided during the hearing, it is evident that the greater portion of the money offered to settle would be paid to the Trustee to partially compensate him for the legal fees and the administration costs incurred in this matter primarily due to Debtor's misstatements, failure to respond, and failure to comply with valid orders of this Court. While it is understandable that the Trustee wants to recover his costs; the interests of the fiduciary cannot be placed above the interest of creditors, the need for finality, and the integrity of this Court's orders. There is no convincing evidence to support the Trustee's suggestion that the creditors would be better off if the Court vacated the judgment denying Debtor's discharge, thus allowing a distribution of \$1,600.

The salient point is that when a discharge is denied, no creditor will face a defense of discharge in bankruptcy and the statutory injunctions attendant to a discharge. If the discharge were to be granted, the rights of every creditor against the debtor would be

³ The Trustee explained at the hearing that, of the \$4,000 offered to the Trustee in the Notice of Settlement, approximately \$2,400 would be used to pay the attorney's fees and costs of the estate's administration while the remaining portion would be distributed to the creditors.

⁴ The UST has recently become active in objecting to the compromise of discharge cases in this District when it appears that a debtor is seeking to improperly purchase the discharge.

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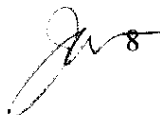
In re Speece, 159 B.R. at 320 (citation omitted).

Finally, there is no basis for the reconsideration of this Court's Order of Civil Contempt and award of sanctions in the amount of \$540. The authority to punish contempt is one of the inherent and integral powers of the courts. "The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice." Ex Parte Robinson, 86 U.S. 505, 510 (1873). Congress has clearly provided remedies in the Bankruptcy Code to cure misuse of the process. Section 105, for example, authorizes bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." See Kestell v. Kestell (In re Kestell), 99 F.3d 146, 148 (4th Cir. 1996). Debtor's repeated failure to appear at scheduled examinations and hearings and his noncompliance with the Court's explicit orders amounted to contemptuous conduct which was properly sanctioned in the Order of October 13, 1998; thus, the Court denies the parties' request to purge the Order of Civil Contempt.

CONCLUSION

For the reasons stated within, it is therefore concluded that the judgment denying Debtor's discharge and the Order of Civil Contempt should not be reversed, and Debtor should not be allowed to settle with the Trustee to reinstate the discharge to which he is not entitled. It is therefore


ORDERED that the Notice of Settlement is denied.

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AND IT IS SO ORDERED.

Columbia, South Carolina,
October 20, 1999.


UNITED STATES BANKRUPTCY JUDGE



CERTIFICATE OF MAILING
The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date within specified to.

OCT 23 1999

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

JUDY G. SMITH
Deputy Clerk

at judgment
Fairbanks
Bellino
Courtesy
J. S. DZ
Kern
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